QUESTION PRESENTED

Whether petitioner had a reasonable expectation of privacy in a rental car when petitioner was not an authorized driver under the rental agreement.

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In the Supreme Court of the United States

No. 16-1371

TERRENCE BYRD, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-8a) is not published in the Federal Reporter but is available at 2017 WL 541405. The opinion of the district court (Pet. App. 9a-18a) is not published in the Federal Supplement but is available at 2015 WL 5038455.

JURISDICTION

The judgment of the court of appeals was entered on February 10, 2017. The petition for a writ of certiorari was filed on May 11, 2017. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a conditional guilty plea in the United States District Court for the Middle District of Pennsylvania, petitioner was convicted of possession of heroin with the intent to distribute it, in violation of 21 U.S.C. 841(a)(1), and possession of body armor by a

prohibited person, in violation of 18 U.S.C. 931(a)(1). He was sentenced to 120 months of imprisonment, to be followed by three years of supervised release. The court of appeals affirmed. Pet. App. 1a-8a.

1. On September 17, 2014, petitioner's girlfriend rented a Ford Fusion from an Avis Budget (Avis) car rental office in New Jersey. Pet. App. 10a. According to Avis's policy, additional drivers may drive a rental car if they are (1) the renter's spouse, (2) the renter's co-employee, or (3) another person who appears in person at the time of the rental and signs an authorized driver form. C.A. App. 73. The rental agreement expressly provides that "permitting an unauthorized driver to operate the vehicle is a violation of the rental agreement." *Ibid.* (capitalization omitted). Petitioner's girlfriend paid for the rental car and was the only person to sign the rental agreement. Pet. App. 10a. Nevertheless, petitioner began driving the car immediately upon leaving the Avis facility. *Ibid.*

Later that evening, a police officer stopped petitioner for a traffic violation. Pet. App. 10a-11a. During the stop, the officer asked petitioner for his driver's license and the rental agreement. *Id.* at 3a. Petitioner produced an interim New York driver's license without a photo and the Avis rental agreement, which did not list him as the renter or an authorized driver. *Ibid.*

When the officer checked petitioner's identification, the computer returned a different name, James Carter. Pet. App. 3a. The officer and a second officer ultimately determined that James Carter was an alias and that petitioner had a lengthy criminal history that included drug and weapons charges. *Id.* at 3a-4a. The officers returned to the rental car and asked petitioner about his alias and whether he had anything illegal in the car.

Id. at 4a. Petitioner replied that he had a "blunt" (meaning marijuana, C.A. App. 101) in the car. Pet. App. 4a. The officers then asked for petitioner's consent to search the vehicle, though they also stated that they did not need his consent because he was not an authorized driver under the rental agreement. *Ibid.* According to the officers, petitioner consented to the search. *Ibid.* As the search began, petitioner also admitted to recently using cocaine. *Id.* at 12a.

The officers searched the car and found body armor and 49 bricks of heroin in the trunk. Pet. App. 4a; C.A. App. 58. After a failed attempt to flee on foot, petitioner was arrested. Pet. App. 12a-13a.

2. A federal grand jury in the United States District Court for the Middle District of Pennsylvania returned an indictment charging petitioner with one count of possession of heroin with the intent to distribute it, in violation of 21 U.S.C. 841(a)(1), and one count of possession of body armor by a prohibited person, in violation of 18 U.S.C. 931(a)(1). Indictment 1-3.

Petitioner moved to suppress the evidence seized from the rental car on the ground that the search of the car had violated the Fourth Amendment. Pet. App. 9a. After conducting an evidentiary hearing, the district court denied the motion. *Id.* at 18a. It held that petitioner lacked a reasonable expectation of privacy in the rental car because, regardless of whether his girlfriend gave him permission to drive the car, "he was not a party to the rental agreement and he did not pay for the rental." *Id.* at 13a. The court also ruled that the officers complied with the Fourth Amendment in initiating the traffic stop and inquiring about petitioner's identity and potential illegal activity. *Id.* at 14a-18a.

3. The court of appeals affirmed in an unpublished, non-precedential opinion. Pet. App. 1a-8a. Relying on circuit precedent, the court held that petitioner could not object to the search of the rental car because a driver who is not named in the rental agreement has no reasonable expectation of privacy in the rental car. *Id.* at 8a (citing *United States* v. *Kennedy*, 638 F.3d 159, 167-168 (3d Cir. 2011), cert. denied, 565 U.S. 1110 (2012)). Accordingly, the court did not address whether petitioner in fact consented to the search. *Ibid.*[1]

ARGUMENT

Petitioner renews his contention (Pet. 10-34) that he had a reasonable expectation of privacy in the rental car despite the fact that he was an unauthorized driver under the rental agreement. The court of appeals' decision is correct, and it does not implicate any square conflict among the courts of appeals, but instead only a relatively shallow conflict with two state courts. Moreover, this case would be a poor vehicle for resolving the question presented because, even if petitioner could properly bring a Fourth Amendment challenge to the search of the rental car, the challenge would fail. This Court has repeatedly denied review in cases presenting the question whether an unauthorized driver has a reasonable expectation of privacy in a rental car,[2] and it should do the same here.

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[1] The court of appeals also held that the traffic stop itself complied with the Fourth Amendment. Pet. App. 5a-8a. Petitioner does not challenge that holding.

[2] See *Goode* v. *United States*, 134 S. Ct. 2291 (2014) (No. 13-8577); *Kennedy* v. *United States*, 565 U.S. 1110 (2012) (No. 10-11094); *Luster* v. *United States*, 558 U.S. 1077 (2009) (No. 09-5734); *Mincey* v. *United States*, 558 U.S. 945 (2009) (No. 08-1482).

1. a. An individual's ability to "claim the protection of the Fourth Amendment depends * * * upon whether" he "has a legitimate expectation of privacy in the invaded place." *Rakas* v. *Illinois*, 439 U.S. 128, 143 (1978).[3] A court may not exclude evidence under the Fourth Amendment unless it finds that an unlawful search or seizure "invaded [the defendant's] legitimate expectation of privacy rather than that of a third party." *United States* v. *Payner*, 447 U.S. 727, 731 (1980); see also *Rawlings* v. *Kentucky*, 448 U.S. 98, 105-106 (1980).

To claim the protection of the Fourth Amendment, a defendant "must demonstrate that he personally has an expectation of privacy in the place searched, and that his expectation is reasonable; *i.e.*, one that has 'a source outside of the Fourth Amendment, either by reference to concepts of real or personal property law or to understandings that are recognized and permitted by society.'" *Minnesota* v. *Carter*, 525 U.S. 83, 88 (1998) (quoting *Rakas*, 439 U.S. at 144 n.12); see, *e.g.*, *Minnesota* v. *Olson*, 495 U.S. 91, 98 (1990). Although legitimate expectations of privacy "need not be based on a common-law interest in real or personal property," the Court "has not altogether abandoned use of property concepts in determining the presence or absence of the privacy interests protected by [the Fourth] Amendment." *Rakas*, 439 U.S. at 144 n.12. Indeed, in two recent cases, the Court has relied on property concepts to hold that the government conduct at issue constituted a search under

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[3] Although the Court has analyzed questions concerning an individual's ability to claim Fourth Amendment protections under the rubric of "standing," the Court stated in *Rakas* that "definition of those rights is more properly placed within the purview of substantive Fourth Amendment law than within that of standing." 439 U.S. at 140.

the Fourth Amendment. See *Florida* v. *Jardines*, 133 S. Ct. 1409, 1413-1418 (2013) (drug sniff around curtilage of home was an unlawful trespass); *United States* v. *Jones*, 565 U.S. 400, 404-405, 411-412 (2012) (installation of a GPS tracking device on a vehicle was an unlawful physical intrusion into the vehicle).

In this case, the court of appeals correctly held that petitioner did not have a legitimate expectation of privacy in the rental car because he was an unauthorized driver under the rental agreement. As the owner of the car, Avis could authorize others to drive the car. Persons authorized to use a car by its lawful owner generally acquire an expectation of privacy in the car. See, *e.g.*, *United States* v. *Miller*, 821 F.2d 546, 548-549 (11th Cir. 1987). That is because authorized users of a car have lawful possession and may legitimately expect that—within the scope of authority granted to them by the car's owner—they can exclude others from the car. See *Rakas*, 439 U.S. at 144 n.12 ("[O]ne who owns or lawfully possesses or controls property will in all likelihood have a legitimate expectation of privacy by virtue of this right to exclude [others]."); *United States* v. *Walker*, 237 F.3d 845, 849 (7th Cir. 2001) ("A person listed as an approved driver on a rental agreement has an objective expectation of privacy in the vehicle due to his possessory and property interest in the vehicle.").

Petitioner, by contrast, did not lawfully possess the rental car because Avis did not authorize him to drive it. The consent of petitioner's girlfriend could not validly authorize petitioner to drive the car because the rental agreement did not grant her the power to let others drive the vehicle. See C.A. App. 73. In fact, the contract expressly advised that "permitting an unauthorized driver to operate the vehicle is a violation of the

rental agreement." *Ibid.* (capitalization omitted). Because petitioner's girlfriend lacked the authority to allow persons not mentioned in the rental agreement to drive the car, petitioner could not reasonably expect to be entitled to control the car and exclude others from it. As such, despite any subjective expectations on his part, petitioner had no expectation of privacy in the car that "society is prepared to recognize as 'reasonable.'" *Rakas*, 439 U.S. at 144 n.12 (quoting *Katz* v. *United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring)).

b. Petitioner's counterarguments are mistaken. Petitioner contends (Pet. 27, 33) that a driver who has the renter's permission to drive a vehicle also has the "authority" to exclude others, but he provides no support for that contention. Here, the contract between Avis and petitioner's girlfriend gave her the authority to drive the car, but it expressly stated that the contract would be void if she allowed another person to drive the car. C.A. App. 73. Petitioner's girlfriend thus had no legal authority to allow petitioner to drive the car or to empower him to exclude others from the car. To the contrary, as an Avis representative testified, if Avis discovers that the renter of an Avis vehicle has loaned the vehicle to an unauthorized person, then the contract is void and Avis "would recover the vehicle." *Id.* at 207.

Petitioner responds (Pet. 32-34) that such reasoning places an undue emphasis on property concepts. But, as explained above (pp. 5-6, *supra*), property interests remain relevant (although not dispositive) in determining whether a defendant has a reasonable expectation of privacy entitled to protection under the Fourth Amendment. Although individuals may sometimes demonstrate a reasonable expectation of privacy without a

possessory interest (Pet. 32), they must exercise "legitimate[]" authority over the relevant premises or effects. *Rakas*, 439 U.S. at 143 n.12. The mere contention (Pet. 33-34) that petitioner's operation of the rental car was not criminal does not affirmatively establish his legitimate authority over the vehicle, particularly in light of the contract expressly stating otherwise.

Petitioner further argues (Pet. 28-29) that an unauthorized driver's expectation of privacy in a vehicle is similar to the privacy rights of subtenants who violate certain terms of their rental agreements (such as prohibitions on pets), or hotel guests who overstay their visits. But the analogy is inapt because individuals have a lesser expectation of privacy in vehicles than in homes. See *Rakas*, 439 U.S. at 148; *South Dakota* v. *Opperman*, 428 U.S. 364, 367-368 (1976). Thus, even if a tenant or guest retains some expectation of privacy in a residence or hotel room, despite having violated a specific contractual term, it does not follow that an unauthorized driver of a rental car has an equivalent expectation of privacy in that rental car. In addition, the risk of damage to property or to third parties from an unauthorized driver of a rental car is far more significant than the minor real-property violations petitioner hypothesizes. Rental car companies require information about the identities of all drivers in order to reduce the risk of damage to the vehicle or to third parties by persons without a valid driver's license, young or unskilled drivers, and drivers with poor driving habits or records. Under those circumstances, society does not recognize as reasonable and legitimate a practice by which the driver of a rental car colludes with another person to conceal from the rental company the identity of an unauthorized driver.

See *United States* v. *Kennedy*, 638 F.3d 159, 167-168 (3d Cir. 2011), cert. denied, 565 U.S. 1110 (2012).

2. a. Contrary to petitioner's contention (Pet. 12-18), no square conflict exists among the courts of appeals. The decision below is consistent with decisions from the Fourth, Fifth, and Tenth Circuits, all of which have concluded that an unauthorized driver of a rental car lacks a legitimate expectation of privacy in the car, even when the renter purports to give him permission to drive it. See, *e.g.*, *United States* v. *Wellons*, 32 F.3d 117, 119 (4th Cir. 1994), cert. denied, 513 U.S. 1157 (1995); *United States* v. *Seeley*, 331 F.3d 471, 472 & n.1 (5th Cir. 2003) (per curiam); *United States* v. *Boruff*, 909 F.2d 111, 117 (5th Cir. 1990), cert. denied, 499 U.S. 975 (1991); *United States* v. *Roper*, 918 F.2d 885, 886-888 (10th Cir. 1990); *United States* v. *Obregon*, 748 F.2d 1371, 1374-1375 (10th Cir. 1984). The Arkansas and Montana Supreme Courts have taken the same view. See *Wilson* v. *State*, 2014 Ark. 8, 9 (2014); *State* v. *Clark*, 198 P.3d 809, 816 (Mont. 2008). In addition, the Second Circuit has held that an unauthorized and *unlicensed* driver of a rental car may not contest a search of the rental car. *United States* v. *Lyle*, 856 F.3d 191, 201-202 (2017).

The decision below is also consistent with decisions from the First and Sixth Circuits. The Sixth Circuit, like the court of appeals in this case, applies the "general rule" that "an unauthorized driver of a rental vehicle does not have a legitimate expectation of privacy in the vehicle," and also recognizes that extraordinary circumstances can make an individual not specifically listed on a rental agreement "the de facto renter." *United States* v. *Smith*, 263 F.3d 571, 586-587 (2001)

(emphasis omitted); see *Kennedy*, 638 F.3d at 165 (stating "a general rule" but also noting an "extraordinary circumstances" exception). In *Smith*, the court explained that the "truly unique" facts of the case made Smith "unlike any of the drivers in any of [the other] cases": Smith "personally had a business relationship with the rental company," reserved the car in his name, and provided the credit card that paid for the rental, and, although his wife ultimately picked up the car, she did so using the reservation number given to Smith. 263 F.3d at 586. In the Sixth Circuit's view, those facts made Smith the "de facto renter." *Id.* at 587 (emphasis omitted).

The First Circuit in *United States* v. *Sanchez*, 943 F.2d 110 (1991), similarly left open the possibility that unusual facts could support a reasonable expectation of privacy by an unauthorized renter of a vehicle. But *Sanchez* refused to recognize the driver's claimed privacy interest where "at best [he] was operating the vehicle with the authority of a person who himself had been given the authority to operate the vehicle by somebody else," *id.* at 113 (citation omitted), and had failed to demonstrate "a more intimate relationship with the car's owner or a history of regular use of the [car]—from which a presumption of permission [from the owner] could be drawn," *id.* at 114. Petitioner does not contend that his case involves any unusual facts that might lead either the First or Sixth Circuit to conclude that he had a legitimate privacy interest in the rental car.[4]

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[4] *United States* v. *Cooper*, 133 F.3d 1394 (11th Cir. 1998), concerned an authorized driver who continued to drive the car after the rental contract had expired. *Id.* at 1397, 1400. Because that person had personally rented the car and was listed as the authorized driver on the contract, and because the company previously had

Petitioner contends (Pet. 12-13) that Eighth and Ninth Circuit decisions support his position, but the decisions he cites do not reflect a division of authority warranting this Court's review. In *United States* v. *Thomas*, 447 F.3d 1191 (2006), the Ninth Circuit rejected the defendant's claim that, although he was not an authorized driver under the rental agreement, he possessed a privacy interest allowing him to challenge the search of a rental car. *Id.* at 1199. The court held that Thomas had no reasonable expectation of privacy in the car because he failed even "to show that he received [the renter's] permission to use the car." *Ibid.* Although the court purported to reject the view that an individual can never challenge a search of a rental car if he is not an authorized driver under the rental agreement, *id.* at 1198, the court was not presented with facts that required it to determine whether such a challenge should be permitted. See *id.* at 1199 ("An unauthorized driver *may* have standing to challenge a search if he or she has received permission to use the car.") (emphasis added). And in the 11 years since it decided *Thomas*, the Ninth Circuit has not incorporated those statements into a holding permitting an unauthorized driver to challenge the search of a rental car.[5]

Petitioner's reliance (Pet. 12) on the Eighth Circuit fares no better. In *United States* v. *Muhammad*, 58 F.3d

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been lenient with respect to overdue rentals, *ibid.*, the court of appeals concluded that he was in a "materially different" position than an unauthorized driver. *Id.* at 1400.

[5] Petitioner also cites (Pet. 13) *Lyall* v. *City of Los Angeles*, 807 F.3d 1178 (9th Cir. 2015), but that case concerned a Fourth Amendment claim by event organizers who had received permission to use a warehouse from the person leasing the space, see *id.* at 1181-1182, not a claim by an unauthorized driver of a rental car.

353 (1995), the defendant "presented absolutely no evidence that he had been granted permission to drive the car." *Id.* at 355. The court of appeals thus rejected his claim of a legitimate expectation of privacy. *Ibid.* The court noted that the parties agreed that "the defendant must present at least some evidence of consent or permission from the lawful owner/renter to give rise to an objectively reasonable expectation of privacy," *ibid.*, but in the absence of any such evidence, the court had no occasion to announce any holding on the showing that would support such an expectation. Later, in *United States* v. *Best*, 135 F.3d 1223 (1998), the Eighth Circuit remanded a case in which the "district court [had] not rule[d] on the standing issue," citing *Muhammad* in dicta stating that "[i]f Thomas [the renter] had granted Best permission to use the automobile, Best would have a privacy interest giving rise to standing." *Id.* at 1225. That remand does not definitively resolve the nature of the relationship required to establish such a privacy interest.

In view of the courts' rejection of the defendants' claims in *Muhammad* and *Thomas*, and the remand in *Best*, neither the Eighth Circuit nor the Ninth Circuit can be said to have resolved the issue in this case in a defendant's favor. Those decisions therefore do not reflect a square conflict on the question presented that would warrant this Court's review.

b. Petitioner also contends that four state courts have held that an unauthorized driver of a rental car has standing to challenge a search of that car if he had permission from an authorized driver to drive the car. Pet. 13-14 (citing *State* v. *Nelson*, 807 N.W.2d 769, 778-779 (Neb. 2011); *State* v. *Van Dang*, 120 P.3d 830, 834-835 (N.M. 2005); *State* v. *Bass*, 300 P.3d 1193, 1196 (Okla.

Crim. App. 2013); *Parker* v. *State*, 182 S.W.3d 923, 925-927 (Tex. Crim. App. 2006)). Petitioner's reliance on *Van Dang* and *Parker* is misplaced.

Neither *Van Dang* nor *Parker* establishes that the courts in the relevant states would reach a result different from the result below on the facts of this case. In *Van Dang*, the New Mexico Supreme Court remarked that the unlisted driver of a rental car can have standing if he presents evidence that he had the listed driver's permission to drive the car, but its actual holding was that the defendant lacked standing because he did not show that he had such permission. See 120 P.3d at 834-835. And in *Parker*, the Texas Court of Criminal Appeals held that courts should "consider[] the circumstances surrounding the use of the vehicle," 182 S.W.3d at 927, which will necessarily differ from case to case. In describing the relevant circumstances that supported standing in that case, the court noted that "nothing in the record * * * indicates that [the defendant] knew about the terms of the car rental agreement or that he knew the agreement did not list him as an authorized driver." *Ibid.* In this case, by contrast, petitioner admitted that he took possession of the rental agreement, C.A. App. 190, which clearly did not list his name, *id.* at 193.

Particularly in the absence of a clear divide among the federal courts of appeals, the relatively shallow division of authorities indicated by the other two state-court decisions does not warrant this Court's review.

3. In any event, this would not be a suitable vehicle for addressing the question presented, because even if petitioner could challenge the search in this case, his challenge would fail.

a. First, petitioner's Fourth Amendment claim would fail because he consented to the search of the rental car. See *Illinois* v. *Rodriguez*, 497 U.S. 177, 181 (1990). The district court, in its recitation of the facts, specifically noted that petitioner "consented to the search," Pet. App. 12a, and the record fully supports that determination. At the suppression hearing, the officer who searched the car testified that petitioner gave his express consent. C.A. App. 102. A video recording of the stop appeared consistent with the officer's testimony. See Gov't C.A. Br. 41 n.11. And petitioner did not testify at the hearing about whether he gave the officers consent. See C.A. App. 187-191. Although the court of appeals declined to address this alternative ground for denying petitioner's motion to suppress, Pet. App. 8a, it would provide a strong basis for upholding the search on remand.

b. Second, even if petitioner had standing to object to the search and even if he had not validly consented, there was probable cause to search the car without a warrant. Police officers may search a vehicle without a warrant so long as they have probable cause that would support a warrant. See *United States* v. *Ross*, 456 U.S. 798, 829-830 (1982). Here, petitioner's admission that he had a "blunt"—meaning marijuana, see C.A. App. 101; see also Pet. 6-7—somewhere in the car alone established "probable cause to believe that contraband [wa]s concealed somewhere within" the vehicle. *Ross*, 456 U.S. at 800. Further, the police also knew that petitioner was subject to an outstanding warrant; he had a lengthy record of drug and weapons charges; he behaved nervously during the stop; and he admitted to recently using cocaine. Pet. App. 3a-4a, 11a-12a; C.A. App. 57-58. That information strengthened the officers' cause to believe

that the car (including the trunk) contained drugs. Although the district court's standing decision pretermitted any discussion of probable cause, see Pet. 26 n.11, the officers' clear probable cause to search the car would provide yet another justification for the search, in the event of a remand. For that reason as well, further review is unwarranted in this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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REPLY BRIEF

RECORD AND BRIEF

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TERRENCE BYRD,

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UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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INTRODUCTION

The government does not dispute that a huge number of drivers are affected by the answer to the question whether a driver has a reasonable expectation of privacy in a rental car when he has the renter's permission to drive the car but is not listed on the rental agreement. Nor does it dispute that the question recurs frequently. The question has divided the courts of appeals and cries out for this Court's immediate review. The government's attempts to show otherwise are meritless.

The government acknowledges a split but argues that some of the conflicting decisions are merely dicta. The government is wrong—the relevant statements are necessary to the outcomes of each of the decisions cited in the petition. That is why seven federal Circuits agree with our assessment of the split's depth. *Infra* 3 n.1.

The government then erroneously suggests that this case is not a clean vehicle for resolving the split, arguing the search here was justified by Mr. Byrd's consent or by probable cause. The legal arguments are wrong, but more importantly, the decision below addressed neither issue. So as presented to this Court, this case turns exclusively on the question presented. There is no vehicle problem.

Finally, the government errs in defending the Third Circuit's rule that, save for "extraordinary circumstances," an unlisted driver cannot have a reasonable expectation of privacy in a rental car. That rule means the police may conduct a search whenever they

encounter an unlisted driver of a rental car, whether or not the police have a warrant or probable cause or, indeed, any suspicion at all. That breathtakingly capacious vision of police authority would give "officers unbridled discretion to rummage at will among a person's private effects," *Arizona v. Gant*, 556 U.S. 332, 345 (2009), in derogation of basic Fourth Amendment principles. The government's position also contravenes this Court's cases by focusing the Fourth Amendment inquiry on the terms of individual car-rental contracts rather than on "widely shared social expectations" of privacy. *Georgia v. Randolph*, 547 U.S. 103, 111 (2006). The petition should be granted.

I. The Government Acknowledges A Split Of Authority And Fails To Minimize Its Depth.

The government does not dispute that the Third Circuit's decision below, along with decisions of the Fourth, Fifth, and Tenth Circuits and the high courts of Montana and Arkansas, directly conflicts with the decisions of the high courts of Oklahoma and Nebraska. BIO 4. Nor does the government dispute that the Sixth Circuit follows a third approach that produces different outcomes. BIO 9-10. Those concessions alone acknowledge the circuit split and the intra-jurisdictional conflict in Oklahoma, where unlisted drivers have standing to challenge the search of a rental car in state court but not in federal court. *Compare State v. Bass*, 300 P.3d 1193, 1196 (Okla. Crim. App. 2013) *with United States v. Worthon*, 520 F.3d 1173, 1183 (10th Cir. 2008).

The government instead goes straight for the capillaries, contending that the 6-2-1 split it acknowledges is "relatively shallow." BIO 4. The government argues in particular that certain statements in the decisions of the Eighth and Ninth Circuits and the New Mexico Supreme Court were not "required" for the outcomes of those cases. BIO 11. The government badly mischaracterizes those decisions. Indeed, seven Circuits have recognized a deep split.[1] Correctly counted, the split is 6-6-1.

In *United States v. Best*, 135 F.3d 1223 (8th Cir. 1998), the record was unclear whether the renter had given the defendant permission to drive the rental car. The Eighth Circuit concluded that the defendant "would have a privacy interest giving rise to standing" if the renter "had granted [the defendant] permission to use the rental automobile." *Id.* at 1225. That language was necessary to the outcome and was therefore not "dicta," BIO 12, because it was the court's *only* basis for vacating the district court's denial of the

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[1] *See* Pet. App. 8a ("A circuit split exists."); *United States v. Lyle*, 856 F.3d 191, 200 (2d Cir. 2017) ("This question has divided ... circuit courts."); *United States v. Kennedy*, 638 F.3d 159, 165-66 (3d Cir. 2011) (canvassing the split); *United States v. Houston*, No. 16-4340, 2017 WL 1957474, *2 n.2 (4th Cir. May 11, 2017) ("[Our rule] ... conflict[s] with ... decisions ... of our sister circuits"); *United States v. Smith*, 263 F.3d 571, 583-86 (6th Cir. 2001) (canvassing the split); *United States v. Sanford*, 806 F.3d 954, 958 (7th Cir. 2015) (noting "the existence of a circuit split"); *United States v. Thomas*, 447 F.3d 1191, 1196 (9th Cir. 2006) (canvassing the split); *United States v. Gayle*, 608 F. Appx. 783, 788 (11th Cir. 2015) ("The circuits ... are split.").

suppression motion and remanding for further findings.

Similarly, in *Thomas*, 447 F.3d 1191, the Ninth Circuit "reject[ed] the government's contention that a defendant not listed on a lease agreement lacks standing to challenge a search." *Id.* at 1198. The court instead concluded that "an unauthorized driver who received permission to use a rental car and has joint authority over the car may challenge [a] search." *Id.* at 1199. The court then affirmed the denial of suppression on the ground that the defendant had "failed to show that he received [the renter's] permission to use the car." *Id.* Were it not for the conclusion that an unlisted driver has standing to challenge a search if he has the renter's permission to drive the vehicle, the court's opinion would contain no reasoned basis for affirming the denial of suppression. That conclusion was necessary to the decision and was therefore not dicta. The Ninth Circuit itself views that conclusion as *Thomas*'s "holding," *Lyall v. City of Los Angeles*, 807 F.3d 1178, 1189 (9th Cir. 2015), as do the district courts in the Ninth Circuit, *see United States v. Pinex*, 129 F. Supp. 3d 982, 990 (D. Mont. 2015); *United States v. King*, 560 F. Supp. 2d 906, 914 (N.D. Cal. 2008).

Likewise, in *State v. Van Dang*, 120 P.3d 830 (N.M. 2005), the New Mexico Supreme Court held that an unlisted driver must "present evidence of consent ... from the ... renter ... in order to establish standing to challenge a search of the vehicle." *Id.* at 834. As in *Thomas*, the New Mexico Supreme Court affirmed the denial of suppression on the ground that

the defendant had not established the renter's consent. *Id.* The statement quoted above is therefore a holding because, without it, the opinion would contain no reasoned basis for the court's decision.

Finally, the government argues (BIO 13) that *Parker v. State*, 182 S.W.3d 923 (Tex. Crim. App. 2006), is distinguishable because the defendant there was unaware that "the agreement did not list him as an authorized driver," *id.* at 927, whereas, here, Byrd had possession of the rental agreement. That purported "distinction" does not diminish the split's depth. Indeed, the government does not dispute that, in Texas, "society ... recognize[s] as reasonable [a defendant's] expectation of privacy in the use of his girlfriend's rental car with her permission even though he was not listed as an authorized driver on the rental agreement." *Id.* That holding, like the holdings of the Eighth and Ninth Circuits and the high courts of New Mexico, Oklahoma, and Nebraska, directly contradicts decisions of the Third, Fourth, Fifth, and Tenth Circuits and the high courts of Montana and Arkansas.

This case involves a deep and established split, as the courts themselves have recognized. It pits the federal Circuits against one another and creates internally inconsistent Fourth Amendment law in five states. Pet. 20-21. As the government notes, over the past several years, this Court has denied certiorari in cases purporting to present the same question. BIO 4 n.2. Our petition explained, however, that each previous case has been hampered by insuperable vehicle problems not present here: that the rental company

had consented to the search or seizure or that the defendant had failed to establish that he had the renter's permission to drive the vehicle. Pet. 25-26. Thus, despite the frequency with which this issue arises, *see* Pet. 22-23 nn.7-10 (citing 35 cases raising the issue in addition to those counted in the split), this case presents the first viable opportunity this Court has had to resolve this divisive and ever-deepening conflict. This is the opportunity the Court has been waiting for, and it should take it.

II. This Case Is An Ideal Vehicle For Resolving The Split.

The government asserts that this case is not a good vehicle because the government may prevail *on remand* on other grounds—that the search was justified by Mr. Byrd's consent and by probable cause. Neither blocks this Court's review—and the government does not say otherwise—because the decision below did not address either issue.[2] In fact, the government did not even assert its probable-cause argument below. If this Court answers the question presented in the affirmative, it should reverse and remand to the Third Circuit for consideration of the issues that court did not reach. And if it answers the question in the negative, the judgment should be affirmed. In either event, the question presented will be dispositive.

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[2] This case is therefore unlike *United States v. Goode*, 550 F. Appx. 84, 84 (3d Cir. 2013), where the district court found, and the Third Circuit agreed, that the defendant had consented to the search and that the police had probable cause to search the vehicle.

The possibility that a respondent might prevail on remand has never been a basis for denying certiorari. And in this case, it is also wrong. The record does not show that the troopers obtained Mr. Byrd's valid consent. Trooper Long's brief and equivocal testimony is the only evidence bearing on the government's assertion that Mr. Byrd purportedly consented to the search. True, Long claimed on direct examination that Byrd said, "yeah, you can search the vehicle." C.A. App. 102. But on recross examination, Long clarified that what Byrd *actually* said was, "I'll get [the 'blunt'] for you," and did not otherwise "consent." C.A. App. 174.

Even assuming that Mr. Byrd signaled acquiescence in the search, it is far from clear that any statement he may have made constituted valid consent. Consent to a search is valid only if "freely and voluntarily given," *Bumper v. North Carolina*, 391 U.S. 543, 548 (1968), which requires more than "mere submission to a claim of lawful authority," *Florida v. Royer*, 460 U.S. 491, 497 (1983). The government must show that Mr. Byrd's consent was voluntary under the totality of the circumstances, and "one factor to be taken into account" is his "knowledge of the right to refuse consent." *Schneckloth v. Bustamonte*, 412 U.S. 218, 227 (1973). According to Trooper Long, Byrd said nothing indicating his supposed approval of the search until Long told him that the troopers did not require his consent. C.A. App. 159-60. On this record, it is hardly a foregone conclusion that the Third Circuit will rule on remand that Mr. Byrd voluntarily consented to the search of the car and its trunk. There is certainly nothing in the Third Circuit's decision suggesting that it would reach that conclusion.

The government's probable-cause argument is equally meritless. The government waived the argument by failing to make it in either court below. And that failure is unsurprising since there is no evidence supporting probable cause to search the car's trunk. Police officers may search a vehicle without a warrant if "there is probable cause to believe a vehicle contains evidence of criminal activity," but they may only search "area[s] of the vehicle in which" they have probable cause to believe "the evidence might be found." *Gant*, 556 U.S. at 347. That is why "[p]robable cause to believe ... the trunk of a taxi contains contraband or evidence does not justify a search of the entire cab," *United States v. Ross*, 456 U.S. 798, 824 (1982), and it is why "probable cause to believe that [a] paper bag in the ... trunk contain[s] marijuana .... d[oes] not [establish] probable cause to believe that contraband was hidden in any other part of the automobile," *California v. Acevedo*, 500 U.S. 565, 580 (1991). Here, Trooper Long claimed that Mr. Byrd had said he had "smoked marijuana" in the car. C.A. App. 168; *see also* C.A. App. 161 (Trooper Long testifying that Byrd said "there was a blunt in the car").[3] Even assuming *arguendo* that the district court had credited that testimony and even assuming that such a remark would have given the troopers probable cause to search the car's *passenger compartment*, the troopers still did not have probable cause to search the car's *trunk*.

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[3] In fact, the troopers found no marijuana in the car. Pet. App. 4a.

III. The Third Circuit's Rule Authorizes Unbridled Rummaging And Ignores Everyday Expectations Of Privacy.

An unlisted driver in the Third Circuit cannot have a reasonable expectation of privacy in a rental car, except in "extraordinary circumstances" not applicable here. Pet. App. 13a. Thus, officers in the Third Circuit may search a rental vehicle whenever the driver is not listed on the rental agreement, whether or not they have a warrant or probable cause—or, indeed, any suspicion of a crime whatsoever.

This fact pattern is not an infrequent occurrence. In 2015 alone, over 115 million separate car-rental transactions occurred in the United States. Pet. 19. And as amicus explains, it is commonplace for unlisted drivers to get behind the wheel of these vehicles. Brief of National Association for Public Defense as Amicus Curiae at 14-15; *see also* Pet. 30-31. In light of the frequency with which this situation arises, the Third Circuit's rule is an affront to the Fourth Amendment's "central concern" that police officers not be given "unbridled discretion to rummage at will among a person's private effects." *Gant*, 556 U.S. at 345; Pet. 27. Correcting the government's astonishingly broad assertion of discretionary authority, and the Third Circuit's acquiescence in it, provides further reason to grant the petition.

The Third Circuit arrived at its sweeping view of police authority by training its Fourth Amendment analysis on the terms of rental contracts. Pet. 15. Rental contracts, however, are adopted for reasons

wholly unrelated to social norms of privacy. Pet. 29. Those contracts are therefore not useful proxies for "widely shared social expectations" of privacy. *Randolph*, 547 U.S. at 111.

The government endorses the Third Circuit's analysis, but it too fails to provide any reason for hinging the Fourth Amendment's scope on the terms of standard-form rental contracts. Instead, the government changes the subject to why nondelegation clauses in rental contracts are reasonable. BIO 8 ("Rental car companies require information about the identities of all drivers in order to reduce the risk of damage to the vehicle or to third parties ...."). The reasonableness of terms in rental-car contracts, however, tells us nothing about the privacy expectations of rental-car drivers, just as the reasonableness of an apartment owner's prohibition on pets tells us nothing about the privacy expectations of her residential tenants.

Under the proper analysis, outlined in *Rakas*, a person has a reasonable expectation of privacy in property, including in a rental car, if he "lawfully possesses or controls" the property. *Rakas v. Illinois*, 439 U.S. 128, 143 n.12 (1978); BIO 6 (agreeing with that analysis). The government does not dispute that Mr. Byrd had exclusive possession and control of the rental car—or that Mr. Byrd would therefore have expected that he could exclude others from rummaging through the car while it was in his possession. Instead, the government contends that Mr. Byrd's possession of the car was not "lawful[]" and that his expectation of privacy was not reasonable because

Avis's rental contract "expressly advised that 'permitting an unauthorized driver to operate the vehicle is a violation of the rental agreement.'" BIO 6-7 (quoting C.A. App. 73). In other words, the government contends that "lawful[] possess[ion]" of a rental car requires strict compliance with the conditions that the owner places on the car's use—including conditions contained in standard-form rental contracts. That view is wrong for at least three independent reasons.

First, the government's position leads to absurd consequences. Pet. 30. Under that position, for example, many drivers would lose Fourth Amendment standing to challenge a search as soon as they "refuel[] the [rental] vehicle with the wrong kind of gas" or forget to "wear[] a seatbelt." Pet. 30 (quoting *United States v. Walton*, 763 F.3d 655, 665 (7th Cir. 2014)). The government suggests no means of avoiding these incongruous results.

Second, the government's position is difficult to apply and therefore fails to give officers "a fair prospect of surviving judicial second-guessing months and years after a[] ... search is made." *Atwater v. City of Lago Vista*, 532 U.S. 318, 347 (2001). Officers in the field will often not know whether a suspect has violated conditions that the car's owner has placed on the car's use. They will not necessarily know, for example, whether the suspect has exceeded the rental contract's geographical or temporal limits or filled the car with the wrong type of fuel. But under the government's rule, the scope of the Fourth Amendment's protections depends on compliance with such conditions. Officers confronting non-owner drivers will

therefore not know whether they require a warrant or probable cause to conduct a search.

Third, the government's position contravenes *Rakas*. There, this Court explained that "wrongful" possession meant possession in violation of the criminal law, while "lawful[] possess[ion]" meant the opposite. *See* Pet. 33-34 (citing *Rakas*, 439 U.S. at 141 n.9, 143 n.12). Thus, here, Mr. Byrd had lawful possession of the rental car because the government does not contend that he committed a crime in coming into possession of it. While the renter may have breached her contract with Avis, that fact has no bearing on whether Mr. Byrd has a Fourth Amendment right not to be subject to a search in the absence of a judicial warrant or probable cause.

CONCLUSION

The Court should grant the petition.

Respectfully submitted,

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